THE CO-OPERATIVE CENTRAL BANK LTD

v.

CHOH HONG KEE & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
T SELVENTHIRANATHAN J
[CIVIL SUIT NO: D1-22-81-1993]
11 JUNE 1998

CIVIL PROCEDURE: *Appeal - Appeal from registrar - Judgment, order or decision on peripheral issue - Whether may be appealed against to judge in chambers under O. 56 Rules of the High Court 1980 - When is a judgment, order or decision of registrar appealable under O. 56 - Scope and intent of O. 56 r. 1*

CIVIL PROCEDURE: *Appeal - Interlocutory order - Judgment, order or decision made interlocutorily by registrar - Whether may be appealed against to judge in chambers under O. 56 Rules of the High Court 1980 - When is a judgment, order or decision of registrar appealable under O. 56 - Scope and intent of O. 56 r. 1*

CIVIL PROCEDURE: *Summary judgment - Affidavit - Affidavit in reply filed out of time not admitted by registrar - Whether decision of registrar may be appealed against - Whether decision to exclude affidavit would have bearing on final judgment - Failure to apply to enlarge time and no explanation why such application not made - Whether affidavit rightfully excluded - Rules of the High Court 1980, O. 56 r. 1*

The plaintiff, pursuant to O. 14 of the Rules of the High Court 1980 ('the RHC'), applied for summary judgment against the defendants ('the O. 14 application'). Consequently, the first defendant orally applied and obtained an order from the registrar that he be given leave to file an affidavit in reply to the plaintiff's O. 14 application within a specified time. The first defendant, however, filed the affidavit in reply out of the time prescribed by the registrar. When the O. 14 application came up for hearing, counsel for the first defendant orally applied to have the affidavit in question accepted but this was objected to by the plaintiff. The registrar upheld the plaintiff's objection thereby disallowing any reference to the facts adverted to in the said affidavit in reply. Being dissatisfied, the first defendant appealed against the refusal of the registrar to admit the said affidavit in reply. The plaintiff raised a preliminary objection to this appeal contending that a judgment, order or decision made or given by a registrar on an issue peripheral to the particular matter that the registrar was called upon to try is not appealable to a judge in chambers under O. 56 of the RHC.

Held:

[1] The Rules Committee, standing in the shoes of the legislature, thought it fit to allow any judgment, order or decision of the registrar to be appealed to the judge in chambers under O. 56 of the RHC. In so doing, it did not impose any fetters on this right of appeal by making a distinction between peripheral and final judgments, orders and decisions so as to curtail that right.

[2] Any judgment, order or decision made interlocutorily is appealable if it will have a bearing on the final judgment, order or decision that is sought.

[3] The exclusion of the affidavit in question, for whatever weight it might carry, would have an effect on the plaintiff's O. 14 application which might or might not, in the end, result in a pronouncement in the first defendant's favour or to his detriment. Therefore, a judgment, order or decision disallowing recourse to the said affidavit in resisting the plaintiff's O. 14 application should be appealable under O. 56 of the RHC.

[4] The question of whether a judgment, order or decision is appealable under O. 56 of the RHC will turn on the nature of the same and the facts of the case. The present judgment, order or decision of the registrar which was being appealed against could not be equated with a ruling by the registrar as to which party should begin in addressing the court, for example, which was purely procedural in nature.

[5] Appeals on preliminary matters are frequently resorted to as a vehicle of delay by the appealing parties. However, as the right of appeal is given by statute, such right can only be curtailed or limited by clear language in the statute so providing. Such curtailment or limitation is within the purview of the legislature to so provide and it is not for the court to circumscribe the legislative intent.

[6] Order 56 rule 1(2) of the RHC provides for an appeal to be brought by serving on every other party to the **proceedings in which the judgment, order or decision was given or made** a notice in Form 114. Section 3 of the Courts of Judicature Act 1964 defines 'proceeding' to mean "… any proceeding whatsoever of a civil or criminal nature and **includes an application at any stage of a proceeding**." Therefore, the oral application of the first defendant to have the affidavit in question accepted in the proceeding relating to the plaintiff's O. 14 application was clearly an application at a particular stage of the latter proceeding, ie, the O. 14 application proceeding, and ergo the judgment, decision or order made or given by the registrar in that stage of the proceeding becomes clearly appealable under O. 56 of the RHC.

[7] The first defendant neither filed any application nor applied orally to enlarge the time within which he was to file his affidavit in reply. He also did not condescend to proffer any explanation for not doing so. In the circumstances, the registrar exercised her judicial discretion properly in not allowing the admission of the affidavit in reply in relation to the plaintiff's O. 14 application.

[Preliminary objection overruled; appeal dismissed with costs.]

Case referred to:
Malayan Banking Berhad v. Chua Keng Leng t/a New Fortune Enterprise [1991] 3 CLJ 2522 ***(not foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
Rules of the High Court 1980, O. 14, O. 56 r. 1(2)

Other sources referred to:
Osborn's Concise Law Dictionary, 8th edn
The Oxford Companion to Law, David M Walker

For the plaintiff - Harpajan Singh (Eric Clement with him); M/s Siva, Thurai, Mariany & Co
For the defendant - Teh Meng Teck (David T Mathews with him); M/s Cheah Teh & Su

Reported by S Dharmendran

JUDGMENT

T Selventhiranathan J:

Having given careful consideration to the case of *Malayan Banking Berhad v. Chua Keng Leng t/a New Fortune Enterprise* [1991] 3 CLJ 2522, it is with the utmost respect that I state that I find myself, with great reluctance, to be in the position of being unable to agree with the decision of the learned judge in that case insofar as he ruled that a judgment, order or decision made or given by a registrar on an issue peripheral to the particular matter that the registrar was called upon to try is not appealable to a judge in chambers under O. 56 of the Rules of the High Court 1980.

Before proceeding further, I wish to state that any reference hereinafter to "Order" and "rule" shall mean that particular Order and rule as they appear in the Rules of the High Court 1980.

The Rules Committee, standing in the shoes of the legislature, thought it fit to allow any judgment, order or decision of the registrar to be appealed to the judge in chambers under O. 56. In so doing, it did not impose any fetters on this right of appeal by making a distinction between "peripheral" and final judgments, orders and decisions so as to curtail that right.

In my view, any judgment, order or decision made interlocutorily would be appealable if it would have a bearing on the final judgment, order or decision that is sought.

Having said that, the exclusion of the affidavit in question, for whatever weight it may carry, would have an effect on the plaintiff's O. 14 application which may or may not, in the end, result in a pronouncement in the first defendant's favour or to his detriment. It therefore follows that a judgment, order or decision disallowing recourse to the said affidavit in resisting the plaintiff's O. 14 application should be appealable under O. 56. The question whether such a judgment, order or decision is appealable under O. 56 would, in my view, turn on the nature of the same and the facts of the case. The present judgment, order or decision of the registrar which is being appealed against cannot, with respect, be equated with a ruling by the registrar as to which party should begin in addressing the court, for example, which is purely procedural in nature.

I need no reminder that appeals on preliminary matters, so to speak of, are being frequently resorted to as a vehicle of delay by the appealing parties. However, the right of appeal being given by statute, it is my view that such right can only be curtailed or limited by clear language in the statute so providing. Such curtailment or limitation is within the purview of the legislature to so provide and it is not for this court to circumscribe the legislative intent.

I find support for the view that I have taken in the definition of "order" in *"Osborn's Concise Law Dictionary"*, eighth edition, which defines "order" as:

> A command or direction; used in law with particular reference to courts of justice. **The directions of a court in a proceeding or matter other than a decree of judgment are termed 'orders' ...** (Emphasis added)

It is my view that the appeal herein is against such an order of the registrar.

I find further support for this view in the meaning attributed to "judgment" in the following terms in *"The Oxford Companion to Law"* by David M Walker:

> Judgments are distinguishable into interlocutory and final judgments, **the former deciding only particular issues or stages of the case,** and the latter finally adjudicating on the matters in issue. Depending on the procedural code of the particular system, appeals to a higher court may be competent against interlocutory judgments or may be competent only against final judgments. (Emphasis added)

In my view, the argument which disposes of with finality the plaintiff's preliminary objection to the appeal of the first defendant is to be found in the language of O. 56 r. 1(2) which provides for an appeal to be brought by serving on every other party to **the proceedings in which the judgment, order or decision was given or made** a notice in Form 114 (emphasis added). Section 3 of the Courts of Judicature Act 1964 has the following definition of "proceeding":

> 'proceeding' means any proceeding whatsoever of a civil or criminal nature and **includes an application at any stage of a proceeding;** (Emphasis added)

Therefore, the oral application of the first defendant to have the affidavit in question accepted in the proceeding relating to the plaintiff's O. 14 application was clearly an application at a particular stage of the latter proceeding, ie the O. 14 application proceeding, and **ergo** the judgment, decision or order made or given by the registrar in that stage of the proceeding becomes clearly appealable under O. 56.

It would appear that the learned judge in *Chua Keng Leng* did not have the benefit of this argument being brought to his attention, in which event his decision may well have been different. This argument was not canvassed even before me by counsel who appeared for the parties.

For the aforesaid reasons, the preliminary objection raised on the plaintiff's behalf to the appeal of the first defendant is dismissed.

However, having said that, I move on to consider whether the registrar arrived at a correct decision in deciding that the facts adverted to in the affidavit in question be not referred to in argument in the proceeding relating to the plaintiff's O. 14 application.

The chronology of events submitted on behalf of the first defendant shows that the plaintiff's application for summary judgment was filed on 12 July 1993. However, it could not be proceeded with until the first defendant's costs of an earlier suit brought by the plaintiff and withdrawn with liberty to file afresh had been paid to the first defendant. The plaintiff, being in receivership, experienced problems in paying the costs. On 9 June 1997, when the plaintiff's O. 14 application at encl. (8) came up for mention (after numerous earlier mentions of the case pending the settlement of the first defendant's costs in the earlier withdrawn suit), counsel for the first defendant applied orally for and obtained an order from the registrar that the first defendant be given leave to file an affidavit in reply to the plaintiff's O. 14 application within one month from the date of settlement of the costs in question.

On 6 August 1997, on a further mention of the plaintiff's O. 14 application, counsel for the first defendant informed the court that the issue of costs had been settled on 8 July 1997 by payment through cheque. However, no application was made to the registrar to extend the one-month timeframe within which to file the affidavit in reply from the date on which the costs were paid, ie presumably on 8 July 1997 itself or soon thereafter on the cheque being cleared, despite the registrar fixing the plaintiff's O. 14 application for 20 October 1997 and directing that the latter date be the final date for the disposal of the said application.

At ten seconds past 8.47am on 20 October 1997, the first defendant filed his defence and notice of intention to use an affidavit in reply filed in the earlier withdrawn suit.

When the hearing of the plaintiff's O. 14 application commenced that morning, counsel for the first defendant sought to refer to the first defendant's defence and the affidavit in reply to oppose the application. Counsel for the plaintiff raised objections on the ground that this was an attempt to delay the proceedings and that the first defendant had not complied with the order of the registrar allowing him time of one month from the settlement of costs on 8 July 1997 to file his affidavit in reply. Counsel for the first defendant contended that the affidavit in reply, which was filed in the previous suit, had then been served on the plaintiff. After a short adjournment, the registrar decided that the affidavit in reply of the first defendant should not be admissible for use to oppose the plaintiff's O. 14 application.

The notes of proceedings recorded by the registrar are then replete with attempts by counsel for the first defendant to refer to the affidavit in reply, which the registrar repeatedly refused to entertain. As a result of these repeated attempts by the said counsel, the proceedings became unnecessarily protracted and were adjourned to 21 November 1997 when the said counsel further persisted with the same attempts. The notes of proceedings recorded by the registrar then show the matter being adjourned to 27 November 1997, but there is no further record of what happened on that date. I am aware that the registrar concerned went on transfer around that time and the matter was probably adjourned to await the outcome of this appeal.

Having regard to the events as set out above, I am of the view that the registrar exercised her judicial discretion properly in not allowing the admission of the affidavit in reply in relation to the plaintiff's O. 14 application.

Around the eve of the expiry of the one-month timeframe given earlier by the registrar, counsel for the first defendant had appeared before her and reported the settlement of costs. Yet no attempt was made to extend that timeframe. The same argument that counsel used to urge the acceptance of

the affidavit in reply, ie that it had been served on the plaintiff in the earlier suit, militated against the first defendant here in that there was no reason why the notice of intention to use the affidavit in reply could not have been served earlier on the plaintiff, unless the intention was to deliberately delay the plaintiff's O. 14 application, as the registrar correctly held. The first defendant neither filed any application nor applied orally earlier to enlarge the time within which he was to file his affidavit in reply. He also did not condescend to proffer any explanation for not doing so. No reason was given why the notice of intention to use the affidavit in reply in the earlier suit was only filed twelve minutes and fifty seconds before the hearing of the plaintiff's O. 14 application was to commence, which hearing had earlier been ordered to be final.

In the circumstances, the registrar was eminently correct in her decision and I do not have an iota of hesitation in upholding the same. Accordingly, the appeal in encl. (12) is dismissed with costs.

I shall now hear the views of counsel as to whether they wish the registrar to hear the substantive O. 14 application or, having regard to the amount of money involved in this action which would make an appeal almost inevitable against any decision, whether to avoid protraction of these proceedings they would consent to my proceeding to hear the O. 14 application now, in view of my having some time available today.

[Counsel state their views]

However, having heard the views of counsel, particularly of counsel for the first defendant who has stated that he needs to take instructions from his client and that he is in no position to waive a hearing before the registrar, I have no alternative but to direct that the present registrar proceed to hear the O. 14 application on a date to be fixed by her.